87-881

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

WILLARD DONALD GROSS

PETITIONER

V

UNITED STATES OF AMERICA

RESPONDENT

PETITION FOR A WRIT OF CERTORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

WILLARD DONALD GROSS
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PRO SE PETITIONER

12pd

QUESTIONS PRESENTED

Whether the court of appeals erred in ruling that the failure to file an appeal and a Rule 35 (b) by defendants counsel within the time limits was not ineffective assistance of counsel under the fifth, sixth and fourteenth Amendments to the United States Constitution?

Whether the court of appeals erred in ruling that petitioners appeal was untimely in lieu of the District Court's order refusing to allow petitioner to file further motions under the fifth and fourteenth Amendments to the United States Constitution?

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TABLE OF AUTHORITIES

CASES:

STRICKLAND V. WASHINGTON 466 US 668
104 Sct 2052 80 Led 674

U.S. V. FIELDS 730 F2d 460 6 Cir 1984

CONSTITUTIONAL PROVISIONS

U.S. CONSTITUTION
FIFTH AMENDMENT
SIXTH AMENDMENT
FOURTEENTH AMENDMENT

STATUTES AND RULES

28 USC 2255
Rule 35 (a)

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DECISION BELOW

The decision of the United States Court of Appeals for the Sixth Circuit is not reported for full text publication. A copy of said Order is attached as Appendix A. The copy of the U.S. District Court Order is attached as Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on August 24, 1987. Jurisdiction is conferred by 28 USC 1254(1).

CONSTITUTION AND STATUTORY PROVISIONS

This case involves Amendment v,vi, and xiv to the Constitution of the United States prohibiting the denial of equal access to the courts, effective assistance of counsel and due process of law:

> nor shall any person...be deprived of life liberty or property without due process of law

STATEMENT OF THE CASE

Attorney Blake Page filed a 2255 on effective assistance of counsel on Jim Early, petitioners trial attorney. Government responded and petitioner requested that a reply be filed. Page did not file a reply on the basis that he was going to appeal the 2255 decision. Page had medical problems at this time and did not file a reply or appeal. He later advised petitioner he obtain the same relief by filing a Rule 35b and

resigned from the case, the court of appeals Order erroneously states that petitioner fired counsel. Petitioner filed a Rule 35b along with a 2255 on ineffective assistance of counsel on both Page and Early. The District Court overruled and petitioner appealed pro se. Case was reversed and sent back for a hearing on ineffective of counsel. Petitioner filed other motions for evidentary material which were overruled. All were related to his 2255 and consolidated together on appeal. (86-6286 & 87-5092). The District Court then entered an order forbiding him to file any further motions or pleadings. Petitioner filed motion for reconsideration. Motion was refused and returned by an unsigned memo. Petitioner filed motion for memo to be signed and it was sent back by an unsigned memo. Petitioner then filed notice of appeal on January 18, 1987. Appeal was afirmed on the basis on the appeal being untimely.

ARGUMENT IN SUPPORT OF GRANTING CERTIORARI

The Order of the Sixth Circuit Court of Appeals conflicts with the ho ldings of this court in Stricklin V. Washington 466 US 668 104

SCT 2052 80 Led 2d 674 (1984) in that petitioner has shown by the evidence and pleadings that (1) the performance of Blake Page was deficient (I think that the failure to file the response was that I didn't need it, and that it would be ..was going to be appealed into the Sixth Circuit. Quoting Blake Page. U.S. District Court opinion) Petitioner has also shown that his appeal was not taken and that he was prejudiced by not being allowed to pursue the ineffectiveness of his trial attorney because of Blake Pages negligence in not appealing and advising petitioner to file a Rule 35b when in fact the time had expired for doing so. It is also evident that a reasonable probability that it would have been reversed for a new trial because of the errors of his trial attorney or Blake Page tock his money under false pretenses.

DENIAL OF EQUAL ACCESS TO THE COURTS

Under the Rules of Appellate procedure in a Civil action, petitioner has 60 days to a ppeal from the last Order entered. The Supreme Court, the Circuits and Districts all hold that 2255 is

a civil action. The government even agrees in its brief that is the time had expired for filing a 35b that under U.S. V. Fields 730 F2d 460 6 Cir. 1984 petitioners rights could still be determined under 28 USC 2255 which the courts customarily entertain and convert a 35b into a 2255 proceeding.

Even if the appeal time is considered under the criminal rules for appeal, the last Order was entered December 12, 1986; petitioner filed for reconsideration hoping to avoid an appeal, but was prevented by the District Courts "gag" Order on December 18, 1986--6 days after the entry of the Order. The District Court refused the motion and mailed it back by an unsigned U.S. Government Memo.

On January 5, 1987 petitioner filed for his motion to be ruled on and the unsigned memo to be signed by someone in authority. This was also returned by an unsigned memo denying petitioner access to the courts dated January 14, 1987. Petitioner then filed his notice of appeal on January 18, 1987. (copy attached)

If said notice of appeal is to be considered

untimely under these circumstances, petitioners constitutional rights under the fifth, sixth and fourteenth amendments to due process of law and equal access to the courts have been violated and his civil rights abrogated by a government agency under the color of law. That said action should be reversed and returned to the lower cou rts ordering a proper ruling.

Although petitioner strongly contends that civil appellate rules apply, he has also compli-ed with the criminal appellate rules and if not it is because of the District Court's Order denying him equal access to the courts violating his 5th and 14th amendment rights..

That the government contended and the court agreed to consolidate said appeals both had co-mmon issues and continuation of events and there would be no prejudice to petitioner.

The United States Supreme Court it self states that a 2255 is a civil matter:

"if yours is a <u>civil</u> case (including hab-eaus corpus or a section 2255 proceeding...)

CONCLUSION

Certorari should be granted because the Court of Appeals decision is contrary to this courts decision in Strickland and its Rules. This case provides the proper vehicle for determining rules of courts denying equal access to the courts and ineffective assistance of counsel.

Respectively Submitted

Willard Donald Gross

Willard Donald Gross
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Pro Se

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PROOF OF SERVICE

Willard Donald Gross, under the penalty of perjury, preposes and says that pursuant to Rule 28.4 of this court, he served the within petition for Writ of Certorari to the Court of Appeals for the Sixth Circuit, on counsel for the Respondent by enclosing 3 copies thereof in an envelope, first class postage, addressed to:

Solicator General of the United States
Department of Justice
Washington, D. C. 20530

....And depositing same in the UNITED STATES mail at Lexington, Kentucky on this 5th day of NOV. 1987

William Donald Gross

Willard Donald Gross
Pro Se